

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR PETITIONER AND
JOINT APPENDIX**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10,663

CLOWE & DAVIS, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

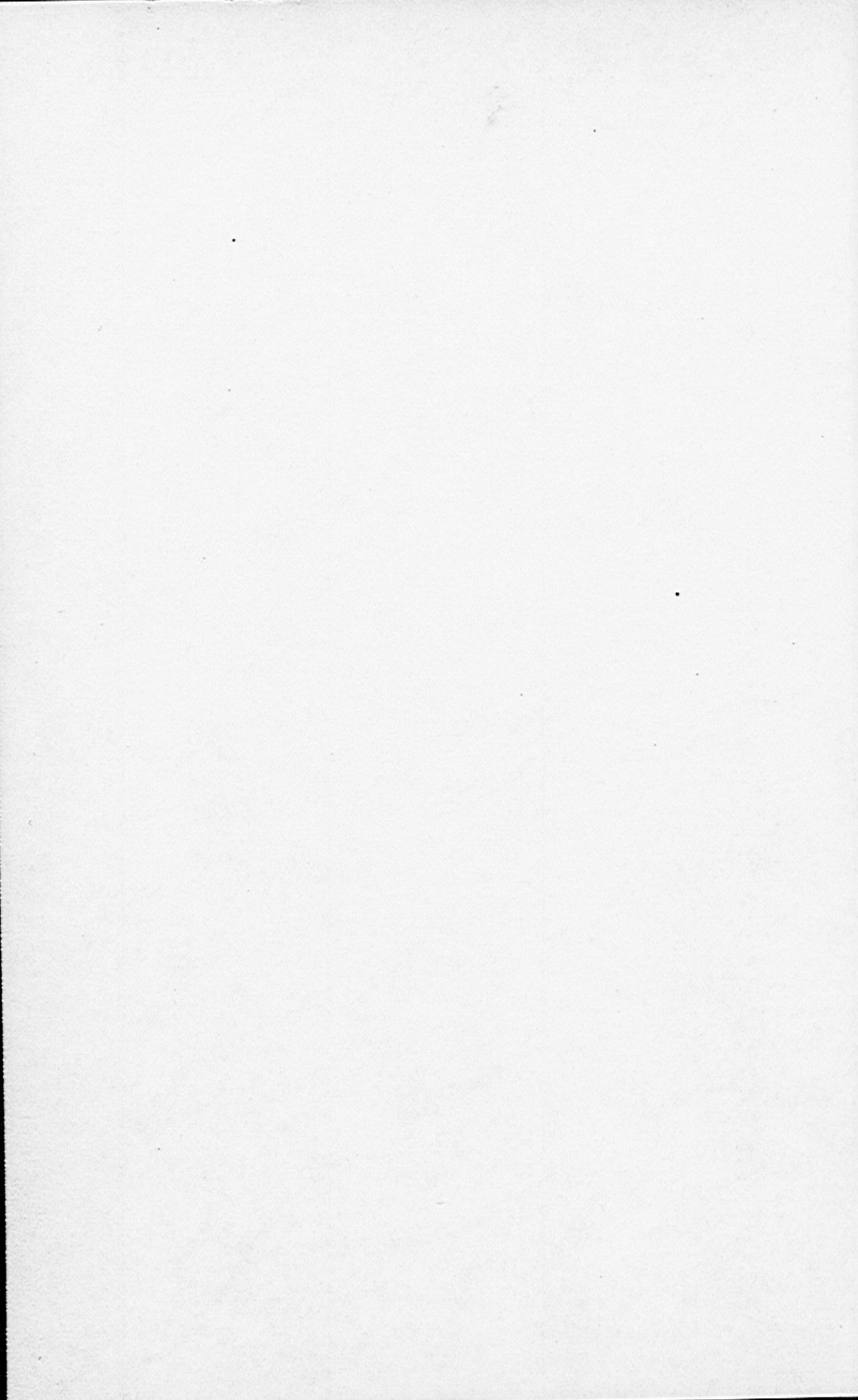
*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 26 1950

Joseph W. Stewart

CLERK

ALFRED CERCEO,
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Washington, D. C.
Attorney for Petitioner.



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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10609

CLOWE & DAVIS, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

BRIEF FOR PETITIONER.

JURISDICTION.

This is a petition to review an order of the Tax Court of the United States, entered January 30, 1950, ordering and deciding that the petition filed herein be and "is stricken". The order based on the motion of the respondent "for failure to prosecute" failed to allow petitioner period of time within which to file amended petition and failed to advise

petitioner of defects in petition and details desired, as provided by Rules of Practice of the Tax Court of the United States and Rules of Civil Procedure. The petition for review was filed March 13, 1950, pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code and Title 28 U. S. C. Sections 2101, 2107.

STATEMENT OF THE CASE.

Petitioner filed original petition on May 26, 1949, based on letter dated March 9, 1949, of proposed deficiencies of \$1,609.33 and \$748.12, in penalty; of \$3,250.85 and \$1,014.00 in penalty and the amount of \$16,791.14 and \$5,037.34 in penalty within the statutory period provided by law. Thereupon, respondent filed July 15, 1949, MOTION TO DISMISS "for failure to prosecute" based on Rule 7(c) (4) (E) of the Rules of Practice of the Tax Court of the United States. Leave to file amended petition was granted and the petition was filed September 13, 1949, within the required period of time.

Respondent on September 28, 1949, filed MOTION TO DISMISS "for failure to prosecute" based on Rule 7(c) (4) (E) of the Rules of Practice of the Tax Court of the United States. Petitioner again requested leave to file a further amended petition to comply with the motion of respondent, which was granted. Petitioner filed a further amended petition on November 7, 1949, on time. Respondent on December 16, 1949, filed a "MOTION FOR AN ORDER FOR A FURTHER AND BETTER STATEMENT OF FACTS UPON WHICH PETITIONER RELIES TO SUSTAIN HIS ASSIGNMENT OF ERROR." The body of the motion provides that, "the Court strike the portion of the pleading hereinafter complained of, as provided by Rule 18 of the Court's rule of Practice as revised to December 15, 1948." Request for leave to file a further amended petition was granted and amended petition filed within the required time on January 30, 1950. Thereupon respondent filed motion to dismiss on February 10, 1950, "for failure to prosecute" and on the hearing of the motion

on March 1, 1950, The Court, ordered that the petition (be), "is stricken." No provision is made in the said order of March 1, 1950 granting to petitioner leave to file further amended petition, and upon failure to comply with said order, the petition stand "stricken" as provided by Rule 18 of the Rules of Practice of the Tax Court of the United States and the Rules of Civil Procedure of the United States.

The petitioner does not have the right to request the grounds on which the Commissioner of Internal Revenue bases the demand for the proposed deficiency in letter dated March 9, 1949. The basis for the proposed deficiency is phrased in the following language:

"Taxable year ended December 31, 1943.	
"Adjustment to net income	
"Net income as disclosed by return	\$ 4,207.57
"Unallowable deductions and	
"additional income	
"(a) Gross profit	24,627.64
"Net income adjusted	\$28,835.21."

The above is all that is stated in the deficiency letter received by the petitioner on which to file a petition to contest the demand. In the above statement nothing definite or certain is stated on which a petition could be properly drawn. It is not stated how the "unallowable deductions and additional income (and) (a) gross profits" has been determined. The motions to dismiss the petitions filed herein based on Rule 7 of the Rules of the Tax Court, are not applicable, because Rule 7, refers to technical defects in the petition and not to the merits.

STATEMENT OF POINTS.

THE PETITION IS BASED ON STATEMENT FURNISHED IN DEFICIENCY LETTER OF MARCH 9, 1949.

THE TAX COURT OF THE UNITED STATES ERRED IN ORDERING AND DECIDING THAT THE PETITION BE AND "IS STRICKEN" BECAUSE OF "FAILURE TO PROPERLY PROSECUTE."

THE TAX COURT OF THE UNITED STATES ERRED IN ORDERING AND DECIDING THAT THE PETITION BE AND "IS STRICKEN" WITHOUT ALLOWING THE PETITIONER TIME WITHIN WHICH TO FILE AN AMENDED PETITION.

SUMMARY OF ARGUMENT.

The petition filed by the taxpayer within time fixed by statute, with the Tax Court of the United States in response to the proposed deficiency asserted by the Commissioner, complied with the Rules of the Tax Court and Rules of Civil Procedure. Was the petition "stricken" because of failure to properly prosecute without just cause and without giving the petitioner the right to file an amended petition justified?

ARGUMENT.

I.

The Petition is Based on Statement Furnished in Deficiency Letter of March 9, 1949.

The petition filed in this matter is based on statement of demand in deficiency letter dated March 9, 1949. The deficiency letter states that the increase resulted from "unallowable deductions and additional income of \$24,627.64." No details or other information is given on which the disallowance and additional income is based. Taxpayer is unable to make the determination on the basis of the limited statement given in the deficiency letter.

The taxpayer should be notified with reasonable certainty of the demand and the basis therefor. This matter has been considered by the United States Supreme Court in the case

of *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 206, 56 S. Ct. 185, 187, 80 L. Ed. 154, where it was held as follows:

“* * * * always a taxpayer is entitled to know with fair certainty the basis of the claim against him.”

The same view is expressed in the case of *Anderson v. Commissioner*, 156 F. (2) 591, (5 TC 482). “Reasonable certainty means that on which a fair and reasonable construction may be called certain without resorting to possible facts which do not appear.” *Hollingsworth v. Holshouser*, 17 Tex. 41, 44.

“* * * * THERE IS NO initial statutory burden resting on a taxpayer to show that he does not owe a tax, in fact the burden rests on the taxing officials to show that a taxpayer is indebted to the government. The burden shifts to the taxpayer only after the Commissioner of Internal Revenue has determined there is a deficiency. *Wickwire v. Reinecke*, 275 U. S. 101; *Schlessinger v. State of Wisconsin*, 270 U. S. 230, 240. Initially the taxpayer is entitled to know the basis of law and facts on which the Commissioner asserts deficiencies and until this is done, there is no burden of proof resting on the taxpayer. * * * ” *Cornett-Lewis Coal Co. v. Commissioner*, 141 F. (2) 1000-1005. (45 BTA 571 reversed).
 “* * * * the decision of the Commissioner of Internal Revenue was not conclusive but only furnished prima facie evidence of its correctness. * * * ” *Wickwire v. Reinecke*, 275 U. S. 101-105.

Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure are applicable to the Tax Court of the United States as well as the Rules of the Tax Court of the United States. In the case of *Cutcliffe v. Commissioner of Internal Revenue*, 163 F. (2) 891, (1947), it was held that:

“Where pleading before Tax Court did not mention issue of limitation on time for making deficiency as-

sessments, defect could have been remedied by amendment, and court should not have eliminated defense of limitation without allowing opportunity to amend. Federal Rules of Civil Procedure, rule 15 (b), 28 U. S. C. A., following section 723 (c).

“* * * * The spirit of Federal Rules of Civil Procedure, rule 15 (b), 28 U. S. C. A., following Section 723 (c) ought to be followed. * * * *”

Under Section 723 (b), Title 28, U. S. C. (Section 2072 of the New Judicial Code) the Supreme Court has power to prescribe general rules, the forms, practice and procedure in civil actions at law for the U. S. District Courts and for the Courts of the District of Columbia. Pursuant to such authority, the Supreme Court promulgated rules which became effective on September 16, 1938, designated “Rules of Civil Procedure”.

Cause of Action Stated.

Petitioner received letter of March 9, 1949, advising of the proposed deficiencies by the Commissioner against the taxpayer for taxes claimed to be due for the year 1943. The forwarding letter proposed two propositions, the first to file a petition with the Tax Court of the United States for a redetermination of the deficiency or deficiencies, which proposition was accepted, and the second to sign “enclosed form” accepting the findings of the tax demanded, which was not accepted.

The cause of action is the redetermination of the deficiencies demanded for the year 1943, by the Tax Court of the United States. The Commissioner accepted the forum to make the redetermination as provided by law. (Section 272 of the Internal Revenue Code, as amended by Section 168 (a) of the Revenue Act of 1942.)

Petitioner filed a petition seeking to set forth a basis for the redetermination of the claimed deficiencies on the meager details furnished in letter of March 9, 1949. The cause of action is the demand for taxes, the petition is

merely the instrument to formulate the grounds on which to try the facts determined by the Commissioner. *Newman et al*, 6 BTA 373; *Wilson*, 6 BTA 378. Motion to dismiss because petition did not state facts sufficient to constitute the basis of an appeal was denied in *Harlan & Co.*, 1 BTA 1027.

Under the equity practice, function of pleading was to state facts and frame issues, while under the Federal Rules the purpose of pleading is to give notice of what an adverse party may expect to meet, the broadening of the discovery rules and other pretrial procedure is designed to define the issues and obtain the facts. Rules 8(a), 12(e), 33-37, 28 U. S. C. A. following section 723 (c), *Porter v. Shoemaker*, 6 FRD 438. *Snyder v. Draco*, 6 FRD 546. Simplicity and concisement is desired. *Canuso v. City of Niagara Falls*, 7 FRD 159.

II.

The Tax Court of the United States Erred in Ordering and Deciding That the Petition Be and "Is Stricken" Because of the "Failure to Properly Prosecute."

The motions to dismiss find their origin in Rule 7 (c) (4) (E) of the Rules of the Tax Court of the United States. Reference of 7 (c) is to the "Form of Petition".—(4) (E) "Clear and concise numbered statements of facts upon which the petitioner relies as sustaining the assignments of error, * * * * " are required to be presented. It is suggested that the petitioner did furnish the required data available to him under the circumstances. All the facts and data available to the Commissioner to reach the conclusion in the letter of March 9, 1949 are not known to the petitioner.

The motions to dismiss under this group was directed to the "FORM OF THE PETITION" and not to the merits of the petition. There was no "FAILURE TO PROSECUTE," by the petitioner.

III.

The Tax Court of the United States Erred in Ordering and Deciding That the Petition Be and "Is Stricken" Without Allowing the Petitioner Time Within Which to File an Amended Petition.

The order striking the petition filed in the instant case is based under Rule 18 of the Rules of The Tax Court. The motion to dismiss is inapplicable under Rule 7 of the Rules of the Tax Court, "for failure to properly prosecute. Rule 18 of the Rules of Practice of the Tax Court of The United States, provides:

RULE 18.—PLEADINGS—GENERAL.

"The Court, upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense, or any other matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the *details desired*. If such order of the Court is not obeyed within 15 days or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed * * * * ." See also, Rules of Civil Procedure, Rule 12 (e).

The motion to dismiss the petition herein was granted, the petition "is stricken" yet the motion as required by Rule 18 failed to point out *the defects complained of and the details desired*. The entire action was arbitrary and unjust and denied petitioner the right to obtain the redetermination of the deficiencies demanded according to law.

CONCLUSION.

It is submitted that upon review of the order granting the motion of respondent that the petition "is stricken" be reversed and finding is made that the petition states matters sufficient to obtain a redetermination of deficiencies demanded and further and other relief be granted to the petitioner.

Respectfully submitted,

ALFRED CERCEO,

Attorney for Petitioner.

APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10609

CLOWE & DAVIS, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**Petition for Review of Decision of the Tax Court of the
United States.**

JOINT APPENDIX.

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Filed May 26 1949

THE TAX COURT OF THE UNITED STATES

Docket No. 23325

CLOWE & DAVIS, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency in income tax of \$1,609.83

and \$748.12 penalty; deficiency of declared value excess profits tax of \$3,250.85 and \$1,040.00 penalty; deficiency in excess profits tax of \$16,791.14 and \$5,037.34 penalty, set forth by the Commissioner of Internal Revenue in notice dated March 9, 1949, and as a basis for this proceeding allege the following:

(1) Petitioner is a corporation, place of business located at 1217 Main Avenue, Southwest, Washington, D. C.

(2) The notice of deficiency (copy attached hereto, Marked Exhibit A) is dated March 9, 1949.

(3) The taxes in controversy are Federal income, declared value excess profits and excess profits taxes for the year 1943.

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

In determining taxable income subject to the Federal income tax; declared value excess profits tax, excess profits tax and penalties, added to income:

4 (a) The Commissioner erroneously included as income for the year 1943 the amount of \$2,374.23, without proper allowance for the cost of the goods; erroneously included as income the amount of \$154.00.

(b) The Commissioner failed to allow costs of produce received from Georgia, shipper; failed to allow brokerage charge of \$825.39; failed to allow cost of \$1,633.40 for carload of vegetables included in inventory as of December 31, 1943; failed to allow credit for the payment of \$34.66.

(c) The Commissioner erroneously and unlawfully demands penalties of 5% and 25% under the statute, whereas the taxes and penalties demanded are barred by the statute and regulations.

(d) The Commissioner failed to allow taxpayer proper credit under the laws and regulations for the computation of the excess profits taxes. The business of this taxpayer is of the class in which capital is not an important income producing factor; and failed to give proper effect to intangibles in determining allowable credits.

WHEREFORE, petitioner prays that the Court disallow deficiency and penalties asserted by the Commissioner and allow relief prayed of no deficiency.

CLOWE AND DAVIS, INC.,
By GEORGE W. DAVIS, *Pres.*

ALFRED CERCEO

Attorney for Petitioner

110 E St., Northwest, Washington, D. C.

* * * * *

6

Deficiency Notice.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Baltimore 2, Maryland.

March 9, 1949.

Internal Revenue Agent in Charge
Baltimore Division
835 O'Sullivan Building.

Clowe & Davis, Inc.
1217 Main Avenue, S. W.
Washington, D. C.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1943 discloses a deficiency of \$1,609.83 and \$748.12 in penalty, and that the determination of your declared value excess-profits tax liability for the year mentioned discloses a deficiency of \$3,250.85 and \$1,014.00 in penalty, and that the determination of your excess profits tax liability for the year mentioned discloses a deficiency of \$16,791.14 and \$5,037.34 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, O'Sullivan Building, 10 Light St., Baltimore 2, Md., for the attention of SND-IT. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

By J. C. WILMER
Internal Revenue Agent in Charge.

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STATEMENT

Clowe & Davis, Inc.
1217 Main Avenue, S. W.
Washington 4, D. C.

Tax Liability for the Taxable Year Ended December 31, 1943.

INCOME TAX					
	Liability	Assessed	Deficiency	5% Penalty	25% Penalty
1943	\$ 2,626.00	\$1,016.17	\$1,609.83	\$ 91.62	\$ 656.50
DECLARED VALUE EXCESS-PROFITS TAX					
1943	3,393.75	142.90	3,250.85	165.56	848.44
EXCESS PROFITS TAX					
1943	16,791.14	none	16,791.14	839.56	4,197.78

In making this determination of your income, declared value excess-profits and excess profits tax liability, careful consideration has been given to the report of examination dated December 14, 1948.

Inasmuch as you failed to file properly executed income and excess-profits tax returns within the time prescribed by law, 25 per centum of the tax has been added thereto in accordance with the provisions of Section 291 of the Internal Revenue Code.

The 5 per cent penalty shown herein for the taxable year ended December 31, 1943 has been asserted in accordance with the provisions of Section 293(a) of the Internal Revenue Code.

Taxable Year ended December 31, 1943.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$ 4,207.57
Unallowable deductions and additional income	
(a) Gross profit	24,627.64
Net income adjusted	28,835.21
8 (a) Gross Profit	

Gross Profit was understated as follows:

Net sales as corrected	\$962,065.53
Cost of goods sold:	
Inventory 1/1/43	\$ 8,525.33
Purchases	671,547.61
Total	880,072.94
Less: Inventory 12/31/43	14,800.35
Net cost of goods sold	865,272.59
Corrected gross profit	\$ 96,792.94
Gross profit per return	72,165.30
Understatement of gross profit	24,627.64

COMPUTATION OF DECLARED VALUE EXCESS-PROFITS TAX

Net income for declared value excess-profits tax computation	\$28,835.21
Less: 10 percent of \$25,000 value of capital stock as declared for the year ended June 30, 1943	2,500.00
Net income subject to declared value excess profits tax	26,335.21
\$1,250.00 at 6.6%	\$ 82.50
25,085.21 at 13.2%	3,311.25
Total declared value excess-profits tax	\$3,393.75

Declared value excess-profits tax assessed		
Original return, Acct. No. 411642	\$ 82.50	
Additional Feb. 47 list, Acct. No. 2-521403	60.40	142.90

Deficiency of declared value excess-profits tax		3,250.85
5% penalty		165.56
25% penalty		848.44

COMPUTATION OF INCOME TAX

Net income for declared value excess-profits tax computation	\$28,835.21
Less: Declared value excess-profits tax paid in 1943	82.11

Adjusted net income	\$28,753.10
Less: Adjusted excess-profits net income	18,656.82

Normal and surtax net income	\$10,096.28
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Normal Tax:

\$5,000 at 15%	\$750.00
5,096.28 at 17%	866.37

Total normal tax	\$1,616.37
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Surtax:

\$10,096.28 at 10%	1,009.63
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Total normal tax and surtax	2,626.00
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9 Income tax assessed	
Original Return, Acct. No. 411642	\$793.61
Addt. Feb. 47 List, Acct. No. 2-521403	222.56
	\$1,016.17

Deficiency of income tax	1,609.83
5% penalty	91.62
25% penalty	656.50

EXCESS-PROFITS CREDIT BASED ON INVESTED CAPITAL

Money or property paid in for stock	\$23,887.47
Accumulated earnings or profits as of Jan. 1, 1943	39,816.06

Total invested capital	63,703.53
Excess-profits credit, 8% of \$63,703.53	5,096.28

COMPUTATION OF EXCESS-PROFITS TAX

Normal tax net income without Sec. 26(e) credit	\$28,753.10
Adjustments	none

Excess-profits net income	28,753.10
Less: Specific exemption	\$5,000.00
Excess-profits credit, supra	5,096.28
	10,096.28

Adjusted excess-profits net income	18,656.82
90% of \$18,656.82	16,791.14
Less: Credit for debt retirement	none

Excess-profits tax liability	\$16,791.14
Excess-profits tax assessed on return (no excess-profits tax return filed)	none

Deficiency of excess-profits tax	16,791.14
5% penalty	839.56
25% penalty	4,197.78

* * * * *

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Filed Jul 15 1949

Motion to Dismiss.

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and

(A) Moves that the above-entitled proceeding be dismissed for failure to properly prosecute, and as grounds therefor states that the petition fails to comply with the Court's Rules of Practice in that it does not contain clear and concise numbered statements of the facts upon which the petitioner relies as sustaining his assignments of error, as required by Rule 7 (c) (4) (E) of said Rules.

WHEREFORE, it is prayed that this motion be granted.

(Signed) CHARLES OLIPHANT,
JCM

*Chief Counsel,
Bureau of Internal Revenue.*

Of Counsel:

PHILIP A. BAYER,
Division Counsel.

SANFORD M. STODDARD,
*Special Attorney,
Bureau of Internal Revenue.*

* * * * *

11

Filed Sep 13 1949

Amended Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency in income tax of \$1,609.83 and \$748.12 penalty, deficiency of declared value excess profits tax of \$3,250.85, and \$1,040.00 penalty; deficiency in excess profits tax of \$16,791.14 and \$5,037.34 penalty, set forth by the Commissioner of Internal Revenue in notice dated March 9, 1949, and as a basis for this proceeding alleges the following:

(1) Petitioner is a corporation, place of business located at 1217 Main Avenue, Southwest, Washington, D. C.

(2) The notice of deficiency (copy attached hereto, Marked Exhibit A) is dated March 9, 1949.

(3) The taxes in controversy are Federal income, declared value excess profits and excess profits taxes for the year 1943.

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

In determining taxable income subject to the Federal Income tax, declared value excess profits tax, excess profits tax and penalties, respondent added amounts to income without allowing proper deductions permitted by the laws and regulations:

12 (a) The respondent erroneously included as income for the year 1943, the amount of \$2,374.23, uncollected sales, payment received during the year 1943, no inventory adjustment made.

(b) Failed to allow cost of partial sale of \$154.00, made on shipment of produce on consignment. Settlement for this consignment was made January 17, 1944. The respondent failed to allow brokerage commissions of \$825.39 paid during the year 1943. Also payment made during the month of February 1943 of \$34.66, costs. Respondent included as income the amount of \$1,633.40, carload of mixed vegetables received during the month of December 31, 1943, without allowing proper costs therefor. Respondent also failed to allow for error of \$69.88 in the purchase journal.

(c) The respondent erroneously and unlawfully demands penalties of 5% and 25% under the statute, whereas the income omitted for the year 1943 is less than 25%, hence the tax and penalties are barred by the statute and regulations.

(d) The respondent failed to consider and allow petitioner proper credit under the laws and regulations in the computation of the excess profits taxes. The business of the petitioner is of the class in which capital is not an important income producing factor, also failed to give proper

effect to intangibles in determining allowable credits as provided by the statute.

WHEREFORE, petitioner prays that the Court disallow the deficiency and penalties demanded by the respondent and allow the relief prayed of no deficiency.

CLOWE AND DAVIS, INC.

By GEORGE W. DAVIS.

ALFRED CERCEO,

Attorney for Petitioner,

110 E Street, Northwest, Washington, D. C.

* * * * *

18

Filed Sep 28 1949

Motion to Dismiss.

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and

(A) Moves that the above-entitled proceeding be dismissed for failure to properly prosecute, and as grounds therefor states that the amended petition fails to comply with the Court's Rules of Practice in that it does not contain clear and concise numbered statements of the facts upon which the petitioner relies as sustaining his assignments of error, as required by Rule 7 (c)(4)(E) of said Rules.

WHEREFORE, it is prayed that this motion be granted.

CHARLES OLIPHANT,

JCM

Of Counsel:

PHILIP A. BAYER,
Division Counsel.

Chief Counsel,

Bureau of Internal Revenue.

SANFORD M. STODDARD,

Special Attorney,

Bureau of Internal Revenue.

sms/jcg 9/21/49

* * * * *

Filed Nov 7 1949

Amended Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency in income tax of \$1,609.83 and \$748.12 penalty; deficiency of declared value excess profits tax of \$3,250.85 and \$1,014.00 penalty; deficiency in excess profits tax of \$16,791.14 and \$5,037.34 penalty, set forth by the Commissioner of Internal Revenue in notice dated March 9, 1949, and as a basis for this proceeding allege the following:

(1) Petitioner is a corporation, place of business located at 1217 Main Street, Southwest, Washington, D. C.

(2) The notice of deficiency (copy attached hereto, Marked Exhibit A) is dated March 9, 1949.

(3) The taxes in controversy are Federal income, declared value excess profits and excess profits taxes for the year 1943.

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

20 In determining taxable income subject to Federal income tax, declared value excess profits tax; and excess profits tax and penalties, the Commissioner alleges that income for the year involved herein was understated by an amount in excess of 25%. Alleging that the income should be \$96,792.94 and not the amount of \$91,701.38.

The facts upon which the petitioners rely as a basis for this proceeding are as follows:

5. The Commissioner alleges that sales of \$962,065.53 were made for the year 1943, whereas the sales made were \$959,691.30. Alleges that cost of goods sold were \$865,272.59, whereas the cost of goods sold were \$867,989.92. The Commissioner also alleges that the gross profit of \$96,792.94 was made for the year 1943, whereas the gross profit was \$91,701.38.

6. The Commissioner erroneously included sales of produce and other income in the amount of \$2,374.23, and failed

to allow other costs of purchases of \$2,717.33 for the year 1943.

7. The Commissioner erroneously demands penalties of 5% and 25% under the statute, which are barred by the statute of limitation.

8. The Commissioner failed to allow proper credit under the laws and regulations for the computation of the excess profits taxes. The business of the petitioner is of the class in which capital is not an important income producing factor, also failed to give proper credit to intangibles in determining allowable credits, as provided by the laws and regulations.

21 WHEREFORE, petitioner prays that the Court disallow deficiency and penalties asserted by the Commissioner and allow the relief prayed of no deficiency.

CLOWE AND DAVIS, INC.

By GEORGE W. DAVIS,
President.

* * * * *
26 Filed Dec 16 1949

Motion for An Order For a Further and Better Statement of the Facts Upon Which Petitioner Relies to Sustain His Assignments of Error.

Comes now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and

Moves that this Court order a further and better statement of facts upon which petitioner relies as sustaining his assignments of error, returnable on a day certain and providing that on failure to comply with such order, the Court strike the portion of the pleading hereinafter complained of, as provided in Rule 18 of the Court's Rules of Practice as revised to December 15, 1948.

In support of this motion, the respondent says that the matter appearing in paragraphs 7 and 8 of the petition,

purporting to set forth allegations of fact, is argumentative in nature, that it sets forth conclusions rather than facts and that it is not related to any assignment of error made in said petition.

WHEREFORE, it is prayed that this motion be granted.

CHARLES OLIPHANT,

JCM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

PHILIP A. BAYER,

Division Counsel.

SANFORD M. STODDARD,

Special Attorney,

Bureau of Internal Revenue.

sms/bas 12/13/49

* * * * *

27

Filed Jan 30 1950

Amended Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency in income tax of \$1,609.83 and \$748.12 penalty; deficiency of declared value excess profits tax of \$3,250.85 and \$1,014.00 penalty; deficiency in excess profits tax of \$16,791.14 and \$5,037.84 penalty, set forth by the Commissioner of Internal Revenue in notice dated March 9, 1949, and as a basis for this proceeding allege the following:

(1) Petitioner is a corporation, place of business located at 1217 Main Street, Southwest, Washington, D. C.

(2) The notice of deficiency (copy attached hereto, marked Exhibit A) is dated March 9, 1949.

(3) The taxes in controversy are Federal income, declared value excess profits and excess profits taxes for the year 1943.

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1943, the respondent alleges that sales of \$962,065.53 were made and the cost of goods sold were \$865,272.59, showing a profit of \$96,792.94 and an understatement of profits of \$24,627.67, subject to income, 28 declared value excess profits and excess profits tax.

(b) The respondent has erroneously added a penalty to the deficiencies for 5% and 25% in the amounts set forth herein, for failure to file returns.

The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(5) The sales of petitioner during the year 1943 were \$959,691.30, cost of goods sold \$867,989.92. Respondent failed to allow as credit additional costs of purchases of \$2,717.33, charges of \$2,374.23 and other charges and expenses.

.....

.....

WHEREFORE, petitioner prays that the Court disallow deficiencies and penalties asserted by the Commissioner and allow relief prayed of no deficiencies.

CLOWE AND DAVIS, INC.

By GEORGE W. DAVIS,
President.

* * * * *

33

Filed Feb 10 1950

Motion to Dismiss.

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and

Moves that the above-entitled proceeding be dismissed for failure to properly prosecute, and as grounds therefor states as follows:

1. The original petition in this proceeding was filed under date of May 26, 1949. On July 15, 1949, respondent filed a motion to dismiss this proceeding for failure of petitioner to properly prosecute. This motion was placed on the calendar of August 3, 1949, for hearing at Washington, D. C., and subsequently continued on request of counsel for petitioner to the calendar of September 14, 1949 at Washington, D. C. On September 13, 1949, petitioner filed an amended petition. Respondent's motion was then denied and the proceeding stricken from the calendar of September 14, 1949 at Washington, D. C.

2. Under date of September 28, 1949, respondent filed a motion to dismiss the proceeding for failure to properly prosecute. The motion was placed on the calendar of October 19, 1949, for hearing at Washington, D. C., and subsequently continued on the request of counsel for petitioner to the calendar of November 9, 1949. On November 7, 1949, petitioner filed his second amended petition.

34 Respondent's motion to dismiss was then denied and the proceeding stricken from the calendar of November 9, 1949 at Washington, D. C.

3. Under date of December 16, 1949, respondent filed a motion for an order for a further and better statement of the facts upon which petitioner relied to sustain his assignments of error, pointing out to the Court, that matter appearing in paragraphs 7 and 8 of the second amended petition, purporting to set forth allegations of fact, was argumentative in nature, that such matter set forth conclusions rather than facts and that it was not related to any assignment of error made in said second amended petition. Upon this motion the proceeding came on for hearing January 11, 1950 at Washington, D. C., and was argued by respective counsel for the parties. After due consideration this Court ordered that petitioner file an amended petition setting

forth proper allegations of error and facts in support of alleged errors on or before February 1, 1950, or show cause at 10:00 a. m., on said date at Washington, D. C., why the proceeding should not be dismissed for failure properly to prosecute. Under date of January 30, 1950, petitioner filed a third amended petition, purportedly in compliance with the order to show cause issued by the Court under date of January 11, 1950, referred to above. The proceeding was then stricken from the calendar of February 1, 1950.

4. The third amended petition does not comply with the Court's show cause order of January 11, 1950, referred to above, in that it does not contain any statement of the facts upon which petitioner relies as sustaining the assignment of error contained in subparagraph (b) of paragraph (4) of the third amended petition.

WHEREFORE, it is prayed that this motion be granted.

(Signed) CHARLES OLIPHANT,
JCM

*Chief Counsel,
Bureau of Internal Revenue.*

* * * * *

36 Order.

This proceeding came on for hearing March 1, 1950, at Washington, D. C., upon respondent's motion to dismiss the amended petition filed herein on January 30, 1950, for failure properly to prosecute. Counsel for the parties argued the motion. After due consideration, it is

ORDERED, that the third amended petition filed herein on January 30, 1950, is stricken.

(Signed) R. L. DISNEY,
Judge.

Dated: Washington, D. C.
March 1, 1950

* * * * *

38

Transcript of Proceedings.

Court Room No. 2,
Internal Revenue Building,
Washington, D. C.
Wednesday, March 1, 1950.

Met, pursuant to notice, at 10:30 a. m.

BEFORE:

HON. RICHARD L. DISNEY, *Judge*.

APPEARANCES:

A. CERCEO, appearing for the petitioner.

SANFORD M. STODDARD, Esq., (HON. CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue), ap-
pearing on behalf of the Commissioner of Internal
Revenue, *Respondent*.

39

PROCEEDINGS

The Clerk: Docket No. 23325, Clowe and Davis, Inc.
State your appearances.

Mr. Stoddard: Sanford M. Stoddard, for the respondent.

Mr. Cerceo: Alfred Cerceo, for the petitioner.

The Court: What is the nature of your motion?

Mr. Stoddard: If Your Honor please, there is before you a motion to dismiss which sets forth in some detail the history of the pleadings in this case. The petitions and amended petitions are there also. But, for our purposes here this morning, the only facts in there that are of importance are that this matter came on for hearing January 11, 1950, here at Washington and was argued by the counsel for the parties and Judge Kern ordered that petitioner file an amended petition setting forth the proper allegations of error and facts in support of alleged errors on or before February 1 or show cause why the petition should not be dismissed.

Now under date of January 30 petitioner filed a third amended petition purportedly in compliance with the order to show cause.

The respondent's position is that that does not comply with the order to show cause. One of the assignments of error is as to the imposition by the Commissioner of the 25 percent late filing penalty and the 5 percent negligence penalty.

40 The Court: That is B-4, is that right?

Mr. Stoddard: That is right. And in the copy of the third amended petition, it, under paragraph 5, shows that there are two lines in blank. What their purpose is I do not know. But, there is nothing in paragraph 5 setting forth the facts upon which the petitioner relies in support of the assignment of error.

The Court: Now, as I understand you, as I now look at this amended petition, the one filed January 30, although it is not—the third amended petition, I take it that is the one you are directing your remarks to?

Mr. Stoddard: That is correct, Your Honor.

The Court: Your motion refers to the last paragraph in your motion which states that "the third amended petition does not comply with the Court's show cause order of January 11, 1950, referred to above in that it does not contain a statement of the facts upon which petitioner relies as sustaining the assignment of error contained in sub-paragraph (b) of paragraph (4) of the third amended petition."

Paragraph B of the January 30 petition states "The respondent has erroneously added a penalty to the deficiencies of 5 percent and 25 percent in the amounts set forth herein for failure to file returns."

You say that he has devoted no facts to that to elucidate that?

41 Mr. Stoddard: That is correct. I did not argue the motion for the Government previously. I understand, though, at that time Mr. Cerceo, counsel for the petitioner, argued that it was not necessary for the petitioner

to allege facts in support of such an assignment of error. Now, I did not hear the argument at that time so I do not know what his position is. But, in any event, that contention was rejected by Judge Kern, and he was ordered to file a proper amended petition.

The Court: I will hear the petitioner.

Mr. Cerceo: I represent the petitioner.

May I, for the sake of clearing up this whole situation, start from the back of this argument?

The taxpayer received a 90-day letter, the petition is based on a 90-day letter that was issued by the Commission. Now here is all the Commissioner says in his 90-day letter, "Net income as disclosed by return \$4,207.50, unallowable deductions and additional income, \$24,627.64, net adjusted income \$28,835.21," and some more figures.

Now, on the basis of that statement the respondent takes the position that we have got to file an answer or a petition that is going to cover that we know nothing about. Now, the Supreme Court of the United States has considered this very problem. The Court stated in the General Utility &

Operating Company versus Helvering, 296 U. S., the
42 Court stated, "Always the taxpayer is entitled to know with fair certainty the basis of the claim against him." That was further supported by Anderson versus Commissioner, 156 Fed. (2d) 591.

Now, what is the fair certainty? Not a fair certainty, it is a reasonable certainty. The Court at page 44 has stated, "Reasonable certainty means that on which a fair and reasonable construction may be called certain without resorting to possible facts which do not appear."

Now, on the basis of the 90-day letter they stated that unallowable deductions, increase of income, that is taxable. We do not know what is back of that picture. We have no way of knowing it. We cannot come to this Court and file a motion and request that the Commissioner amend his 90-day letter and set forth facts on which he bases the disallowance of those items; we cannot do it. We have got to take his 90-day letter and proceed on that 90-day letter.

Now, let us say something about the two other motions that were filed to dismiss in this case.

The first one was directed—

The Court: Let me ask you this right there.

Perhaps it will help you and I do not think it will interrupt you much. It would help me, perhaps, at any rate. Is it true that what, in effect, you are saying or leading up to anyway is that it is not necessary for you to say anything more than you have in 4-B of your third amended petition?

43 Mr. Cerceo: No, I do not say that. But, if Your Honor pleases, I have come here and I have attempted to point out to the Court that on the basis of whatever information we have we cannot file a more complete petition. It is impossible unless we are going to go around digging around the sky and come up with some Ouija board answer which will not be sufficient. Now, the first two motions that were filed in this case to dismiss the petition were made on the basis of Rule 7 of the rules of the Tax Court.

The first one was 7 (c) (No. 4). It went to the form of the petition.

Now, there was no objection to the petition. The respondent came in here and stated that it was not sufficiently stated in the petition to permit an answer. The second one came back and again it went to Rule 7, paragraph 2. Now, that particular rule only covers technical violations of the rules of this Court and that the petition should be substantially in accordance with Appendix 1 "It shall be complete in itself so as to fully state issues." And it has nothing to do with the purpose that the respondent filed that petition.

Now they come along and they filed a third motion. On the third motion to dismiss they refer to Rule 18 and that is the proper rule that should have been referred to during the entire time that these motions have been filed. The motion refers to Rule 18.

44 However, let us read and see what Rule 18 has to say about this matter. I wish to say at this time that

this thing here is a serious matter for my client. There is a demand of \$25,000 in taxes. It might mean that he might have to go out of business if he cannot pay. Now, we are not paying—I filed a free petition, I will admit that. However, the Rule 18 under which the last two motions were filed—here is what the rule states, “The Court upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense, or of any matter stated in any pleading.” Then it says, “Such a motion filed by a party shall point out the defects complained of and the details desired.” I will submit that there is no motion that has been made of those details desired to be set forth, and we have never neglected to furnish them if we had them in our power. Then it says “If such order of the Court is not obeyed within 15 days or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or may make such other order as it deems just.” Not dismiss, but may strike. There is quite a difference between striking and dismissing.

The pleading to which a motion was directed, etcetera.

The Court: That, of course, would be permissive of dismissal if the Court deemed necessary.

Mr. Cerceo: However, I think the proper motion
 45 is to strike the pleading. If Your Honor please, I am really thoroughly confused about this thing. I might state off the record that I was a Revenue Agent and I prepared reports on which taxpayers had to come in and defend the records. During the entire time I have practiced with the Department I have never seen a statement of this kind where it says net income as disclosed by return unallowable deduction and additional income and stop right there and say “All right, brother, there is the ball. You run with it and see how far you get with it.” If the respondent thinks that the petition is insufficient then I think that the proper way of handling it is the way that it has been handled the last two times under Rule 18, that they come in and file a

motion to strike. Let the details desired be set forth, etcetera.

Now, under the rules, Federal rules of procedure—

The Court: We have our own rules.

Mr. Cerceo: If Your Honor please, these appellate decisions have held that these rules, while they have not said it in so many words, that they are applicable to the Tax Court.

Now, that is Rule 12-E of the Federal Rules of Civil Procedure and it is practically the same as the rules of this Court; before responding to a pleading or if no response is made within 20 days a party may move for a definite statement or for a bill of particulars of any matter which is not
 46 averred with such definiteness or particularity to enable him properly to prepare the responsive pleading.

Now, I submit, if Your Honor please, I am not trying to dilly-dally with the time of this Court, I am quite busy also. I am anxious to submit the data that respondent is requesting. But, however, I do not know what is requested and under the rules of this Court, Rule 18, I think that respondent should be made to file a motion stating exactly what he is after.

The Court: Do you mean by that you think that the respondent in his motion instead of alleging as he does in his fourth paragraph that your paragraph 4 (b) does not contain any statement of facts upon which the petitioner relies as sustaining the assignment of error as to the 5 percent and 25 percent penalties; do you mean by what you say that you think he should point out in his motion the details he thinks you should furnish as to the 5 percent and 25 percent penalties? Is that your idea?

Mr. Cerceo: If Your Honor please, I differ with respondent's counsel—

The Court: I just want to know what your idea is.

Mr. Cerceo: May I explain? That is the burden that is on the Commissioner to show that before a penalty can

be assessed that they have got to come in and prove, I submit it is not the duty of the petitioner because, under the law—and I have cases in support of the question—
 47 that it is the duty of the Commissioner to come in here and prove that the penalty of 25 percent and 5 percent is due.

The Court: Is it true or not true that upon the previous hearing and upon this motion you took the position that your allegation was sufficient in that regard and that you did not need to furnish those details and that the Court took the opposite view? I understood counsel so to state. Am I correctly stating that?

Mr. Stoddard: That is correct. Mr. Woolf of our office argued the motion and he so informed me.

He then argued that the burden was upon the Government in regard to the 5 percent and 25 percent penalties and Mr. Cerceo then presented that argument and the Court told him that that was not the case and he would be required to plead facts in support of his assignment of error.

The Court: Is that a correct statement or not?

Mr. Cerceo: I do not recall making that statement. Now, I am not trying to dodge the issue; if I made the statement I would say that I did, but I do not recall having made that statement.

The Court: That seems to be your position now.

Mr. Cerceo: No, my position, if Your Honor pleases, is that the burden of proof on the penalties is upon the respondent to prove and not the petitioner to disprove. It is a matter strictly within the sphere of information and
 48 knowledge of the respondent. We do not know why we have to pay 25 percent penalty or a 5 percent penalty. As I recall, I cited a case to Judge Kern at the time. I don't recall what Judge Kern said at that time. I imagine there are stenographic records of that. The best way would be to look at them.

Now, we want to file an adequate petition to go to trial on the issue.

The Court: All right, I will give you that chance.

The third amended petition is stricken. I am not dismissing the case, but I am striking the third amended petition.

Now you can proceed from there.

Mr. Cerceo: Will your Honor consider this, that under Rule 18 that the respondent be requested to state reasons, what information he wants?

The Court: No, I am striking this petition.

Mr. Cerceo: I wish to note an appeal. I wish to take this matter to the Court of Appeals.

The Court: You may take your appeal.

Mr. Cerceo: Will the record show that you are dismissing this petition?

The Court: No, it does not. I specifically said that I was not dismissing the petition; I am striking this third amended petition.

Mr. Cerceo: How much time will Your Honor give me—

49 The Court: I have made an order here. Now, proceed from there under your rights.

Mr. Cerceo: All right. I note an appeal, if Your Honor pleases.

(Whereupon, at 10:05 a. m. the hearing was closed.)